

# NAMTEC

N-104-4

National Association of Minority Telecommunication Executives and Companies

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

November 29, 1993

Mr. William Caton  
Acting Secretary  
Federal Communications Commission  
Office of Small Business Activities  
1919 M Street  
Washington, DC 20554

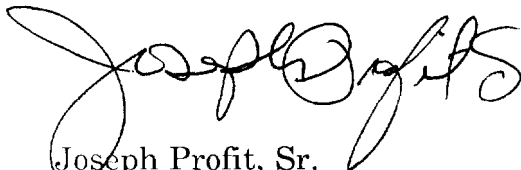
**SUBJECT: Reply Comments of the National Association of Minority  
Telecommunications Executives and Companies for  
Notice of Proposed Rule Making - PP Docket No. 93-253**

Dear Mr. Caton:

Please find enclosed a copy of the National Association of Minority Telecommunications Executives & Companies' (NAMTEC) response to the Implementation of Section 309(j) of the Communications Act Competitive Bidding Notice of Proposed Rule Making PP Docket No. 93-253.

Should you have any questions, please do not hesitate to contact me.

Sincerely,



Joseph Profit, Sr.  
Chairman

JP/

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Achievement of Section 309(j) ) PP Docket No. 93-253  
of the Communication Act )  
Competitive Bidding )

REPLY COMMENTS  
OF THE  
NATIONAL ASSOCIATION OF MINORITY TELECOMMUNICATION  
EXECUTIVES AND COMPANIES

National Association of Minority Telecommunication Executives and Companies (NAMTEC)<sup>1</sup> submits these Reply Comments in response to the Comments filed in this proceeding.<sup>2</sup> NAMTEC in its original comments, concurred with the constitutionality of the Commission's proposed preference for designated entities, offered methods for structuring and maximizing the use of the preferences; suggested options that would enhance the opportunity for designated entities to be involved in the bidding, and encouraged

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1 NAMTEC is a national association formed in 1988 that has over 480 telecommunications executives and companies. The goal of the organization is to increase the number of women, small businesses and minorities in the telecommunication industry, also, to inform its members and their communities of trends and opportunities in the industry.

2 Comments were due on November 10, 1993. Reply Comments were originally due on November 24, 1993. However, the Commission extended the due date for Reply Comments until November 30, 1993 (SEE Public notice, DA 93-1420, adopted November 22, 1993). Thus, these comments are being submitted in a timely manner.

the employment of appropriate safeguards and limitations to ensure that the benefits of the preferences reach the intended designated entities. These Reply Comments focus on issues and arguments made for and against utilization of preferences and concomitant issues about the auction process.

## I. CONSTITUTIONALITY OF PREFERENCES

### A. Congress is Permitted to Use Set-Asides Under the Commerce Clause of the Constitution

Most of those filing comments have supported the use of set-asides for the designated entities; however, a few parties have opposed the Commission's proposal to set aside Blocks C and D in the BTA for bidding by the designated entities. NAMTEC urges the Commission to use the set-asides for reasons included in its comments and submitted in this reply. The use of set-asides is the most effective way to ensure that designated entities have an opportunity to bid for the PCS spectrum.

Article ONE of the United States Constitution authorizes Congress to regulate Commerce. Under the Commerce Clause, Congress has the authority to regulate public transportation, whether by ship, ground or air, public accommodations, including hotels and motels as well as airwaves, regardless if its television, radio, cable or the telephone lines. Opponents of the set-asides for designated entities contend that the proposed preferences violate the equal protection clause of the United States Constitution. However, the equal protection clause guarantees to all Americans that are similarly situated equal protection under the law.

Nonetheless, the plethora of documentation provided by Congress and that can be readily observed present irrefutable evidence to the Commission that designated entities such as minorities, woman and rural small businesses are not as well capitalized as BellSouth, American Telephone and Telegraph, Ameritech, and other entities that received benefits from past monopoly. Therefore, they are not in the same class as other well capitalized firms. Where persons of different classes are treated differently, there is no equal protection violation. Only where members of same class are treated differently may affected person proceed with equal protection claim. Therefore, there is no conflict between the Commerce Clause and the Equal Protection Clause involving the set-asides.

Moreover, the Commission is urged by the opponent's argument that Congress did not adopt in the final version of the Budget Reconciliation Act of 1993, a set-aside for rural telcos, and thus, Congress did not intend for set-asides to be employed in any form. The argument has no merit. Absent from BellSouth and Telocator comments are congressional records of debate on the set-aside issues nor acknowledgement from them that Congress would have specifically prohibited any not desired preference. Congress gave the Commission broad latitude to decide and implement rule-making that would include the designated groups into the PCS bidding auction. Congress has confidence from the Commission history for fairness and inclusion of diverse individuals and points of view on the licensed airwaves that the Commission will use its authority prudently.

In fact, assuming the proposed preferences were construed by a court as based on race or gender status, the set-aside would pass constitutional review because it advances important governmental interest and are substantially related to the goal of improving economic opportunity for businesses owned by minorities and women.

B. The Broad Use of Tax Certificates is in  
the Public Interest and Enhances the  
Goals of Congress

The Commission received strong support for tax certificates to help the designated entities. NAMTEC supports the availability of tax certificates for investors, banks and brokerage firms helping designated groups. The tax certificates should cover a period of ten years. The tax certificates will provide for the financial institutions up to 20 percent credits for the invested amount off taxes. The congressional goal of furthering long-term relationships between financial institutions and designated groups and improving economic opportunity for businesses that are owned by minorities and women would be advanced by implementing this strategy.

Many comments support the use of tax certificates in an array of transactions, including when a designated entity sells its license to pay any deferred auction price, when a license is sold to a designated entity and when investors sell their interests in a designated entity. It is agreed that targeted use of tax certificates will increase investment opportunities for designated entities. The designated entities will need the flow of capital to competitively bid for the spectrum, construct and operate a PCS

system, and effectively compete in the PCS marketplace. The Commission should adopt an effective and comprehensive tax certificate program to further the Congressional goal of ensuring economic opportunity for the designated entities.

C. The Commission Should Allow Interest-Free Installment Payments or Reduced Interest.

NAMTEC supports the Small Business Administration (SBA) recommendation for installment payments for designated entities without interest. SBA states that "the public interest is better served by the government forgoing the payment for the time value of money in return for the rapid deployment of PCS and designated entity involvement in new technologies. Familiar with the enormous capital requirements to bid for spectrum and then construct and operate a PCS system, the Commission should consider interest-free installment payments.

Nonetheless, if the Commission determines that interest should be paid, the Commissions should benchmark that interest to be one point above the federal fund rate. The best payment terms to the designated groups should be selected by the Commission. Participation by the designated groups will be enhanced by interest-free installments payments or reduced interest.

D. Qualified Designated Entities Should Not Be Required to Make Full Up-Front Payment and Deposit

The Commission should require all designated entities to demonstrate their technical capability of deploying the PCS

spectrum. Once the Commission is satisfied with the quality of the designated entity, the Commission should award them with a credit up to 50 percent of the up-front payment and deposits. Most prospective bidders have recognized the financial burden that designated entities would face under the Commission tentative proposal for up-front payments and deposits. SBA has recommended that the designated entities be allowed to provide their up-front payments in the form of a bond. Others have suggested that a letter of credit should suffice; however, a letter of credit is the equivalent of a cash payment.

Recognition by the majority of comments on this issue is a clear indication that the Commission must give some form of relief on up-front payments and deposits for designated entities. The Commission is encouraged to allow the designated entities to choose a payment strategy that suits them best. Therefore, flexibility to pay their up-front payment and deposit by a bond, cash if not too burdensome or a letter of credit.

E. Bidding Credits is in the Public Interest and  
Furtheres the Goals of Congress

From a review of the comments, there is strong support in the record for providing bidding credits to the designated entities. An array of bidding credit proposals has been advanced. Some parties have suggested bidding credit as high as 25% for designated entities. NAMTEC supported a 10% credit for designated entities regardless whether or not an "innovators' preference" is

established, such as was suggested by the Small Business Advisory Committee (SBAC).

There is strong support that the bidding credits for designated entities is in the public interest and should be adopted by the Commission. NAMTEC's recommendation for a 10% credit should be a benchmark credit. Moreover, non-designated entities that include designated entities should be given consideration as a credit linked to the percentage of designated entity participation.

Rural telcos are eligible for favorable interest rates by virtue of REA financing. For the purpose of ensuring a level playing field of all designated entities, rural telcos should not be allowed to use bidding credits to the extent that they are allowed to use REA Funding for the development of PCS. Thus, to avoid a double preference to rural telcos, rural telcos should be eligible for bidding credits only if they are not allowed to use REA funding for PCS.

## II. THE SCOPE OF THE PREFERENCES

### A. The Use of Preferences Beyond the Set-Aside is in the Public Interest and Advances the Goals of Congress.

A vast array of comments supports preferences for the designated entities beyond the set-aside blocks. The financial realities of PCS suggest that a business based solely upon the set-aside blocks of spectrum will be at a significant competitive disadvantage with the business using the larger 30MHz blocks based on the MTA. This has been observed by Commissioner Barrett and



many parties. Therefore, the aggregation of the preference blocks outside the set-aside spectrum is crucial to ensuring economic opportunity for the designated groups, thereby advancing the goals of Congress.

It is imperative that the Commission provides designated entities with the set-aside blocks of spectrum in addition to the broad use of the preferences. The use of the preferences solely within the set-aside blocks of spectrum will do little to promote Congress goals of improving economic opportunities for minorities and women if the blocks cannot be aggregated to maximize their economic value. The Commission is directed to ensure economic opportunity for the designated groups. The Commission should provide the set-aside blocks and allow the preferences to be used outside the set-aside blocks to ensure the opportunity that Congress intended.

B. The Commission in Order to Advance  
Economic Opportunity Should Provide  
Proportionate Preferential Credit for  
Consortia that Include Designated  
Entities.

The Commission should encourage the formation of consortiums of designated entities and non-designated entities. Both groups can benefit from each other's experiences and business acumen. Such alliances will play an important role in ensuring the rapid development of PCS. Nonetheless, it is important that the designated entities have an opportunity to participate in bidding consortia without losing their eligibility for preferential treatment. MCI Telecommunications and others strongly endorsed a

"proportionate preferential credit" idea. Under a proportionate credit system, an enterprise that is 20% owned by designated entities would be allowed to make installment payments for up to 20% of the bid price. That enterprise would similarly be eligible for a bidding credit proportionate to the level of designated entity involvement. Once the level of designated entity involvement rises to a level of control, the enterprise would be eligible for full preferential treatment.

If consideration in the form of a proportionate credit is not allowed for the non-designated group, the designated entities will have a disincentive to join a group since they would lose their eligibility. Nor will the promoters of consortia have an incentive to include the designated entities within their groups. A proportionate preference credit system will provide economic opportunity for even the smallest enterprise because it will encourage joint ventures between the designated entities and more well capitalized groups. The Commission should adopt a proportionate credit system to further the goals of Congress.

B. The Commission Should Use it's Historic Definition for Determining Minority and Women-Owned Businesses.

The Commission employing the Broadcast standard for defining a minority or women-owned business has required these businesses to have minorities and women to have voting control and own at least 20% of the equity of a business to be eligible for preferential treatment. Some comments have suggested that the standard have been subject to abuse and therefore, should not be employed. NAMTEC is cognizant that no definition would yield perfect results

100% of the time and thus urges the Commission to give these designated groups the latitude to raise capital. The broadcast standard strikes a reasonable balance between deterring the abuses and achieving the underlying policy goals.

Some parties have advocated an eligibility standard that requires an ownership interest by minorities and women of at least 50.1%. The Commission must factor in the incentives of tax credits, bidding credits, relax up-front payments and deposits and aggregation of set-aside blocks before figuring out the desired equity percentage of the designated groups. Of course, the groups that Congress directed the Commission to help are generally those with limited financial resources. Therefore, these individuals must be granted broad discretion to form adequate capital structuring.

### III. MISCELLANEOUS ISSUES

#### A. The Commission Should Adopt Strict Anti-Trafficking Rules

NAMTEC agrees with those who argue that trafficking restrictions should apply to the set-aside licenses. The Commission must create a disincentive against mere speculators and would-be profiteers who have no real interest in providing spectrum-based services. Otherwise, the Congressional goal of ensuring participation by the designated entities in spectrum-based services will not be fulfilled. NAMTEC supports a three-year holding period before the license can be sold. Nonetheless, if special circumstances warrant a distress sale, a deserving party could seek relief from the holding period by requesting a waiver. Thus, a holding period should not be viewed as too restrictive.

B.    The Commission's Proposals        for  
      Combinatorial Bidding Must Be adopted

There are not unanimous comments over the Commission's proposed use of combinatorial bidding.    There will be no fewer than 3 PCS licenses in any one market if no single entity can aggregate more than 40 MHz of spectrum in a single market that the Commission is proposing.    Most of the markets for the cellular systems already have only two competitors that will present competition; moreover, a Specialized Mobile Radio (SMR) system or an Enhanced SMR ("EMSR") system will also present competition in the wireless service market.    Indeed, maximum competition in the marketplace will be possible while the Commission's need to promote the rapid deployment and introduction of PCS.

Combinatorial bidding will allow an effective PCS strategy. Designated entity will be more likely become involved in the PCS system if they're combinatorial bidding.    National service providers will seek out and obtain partnerships or strategic alliances with qualified designated entities throughout the nation if the Commission allows proportionate preferential credit outside the set-aside blocks as NAMTEC has recommended.    The national service providers will find that the designated groups have a valuable asset if combinatorial bidding is allowed.    Combinatorial bidding must be adopted to effectively balance the need to promote the rapid deployment and introduction of PCS and maximize competition in the marketplace.

C.    The Sequence of the Auctions Should

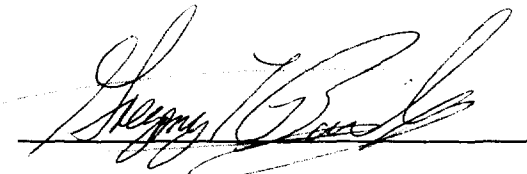
Horizontal and Top-Down Provided That  
There is No Delay in the Auction Process.

NAMTEC supported the Commission's proposal to auction all geographic regions within one spectrum block, continuing from the top down. NAMTEC continues to support a horizontal, top-down sequencing approach if the entire PCS auctioning process can be completed within a reasonable time. Should there be a substantial delay (i.e., 90 days or longer) between the auctioning of the licenses on the MTA level and the auctioning of licenses on the BTA level, the MTA licensees will have a headstart in the marketplace that will give them a significant competitive advantage over the smaller BTA licensees. Because of this possibility, NAMTEC recommends that the Commission maintain the flexibility to revise its auctioning sequence so that it would be fair to all potential bidders should it become apparent that the auctioning process will be to subject delays of 90 days or longer.

WHEREFORE, NAMTEC asks the Commission to implement the preferences for designated entities as discussed above, together with the supplemental provisions discussed in these Reply Comments, and the original comments.

Respectfully Submitted,

NATIONAL ASSOCIATION OF MINORITY  
TELECOMMUNICATIONS EXECUTIVES AND COMPANIES

A handwritten signature in black ink, appearing to read 'Gregory T. Bailey', is written over a horizontal line.

Gregory T. Bailey

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Its Attorneys

November 27th, 1993